IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION ACT NO.7 OF 2002

AND CROSS OBJECTION IN

APPEAL UNDER ARBITRATION NO.9/2002

Dempo Engineering Services
V.S. Dempo & Co. Pvt. Ltd.,
Campal, Panaji, Goa. ..... Appellants.

V e r s u s

Union of India,
Represented by the Chief Engineer,
Chennai Zone, Island Grounds,
Chennai – 09. ..... Respondents.

Mr. Sudin Usgaonkar, Advocate for the Appellants.

Mr. E.P. Badrinarayan, Advocate for the Respondents.

CORAM: DR. S. RADHAKRISHNAN, J

DATE: 15th September, 2006.

ORDER

1. The above appeal has been filed by the original claimant

challenging the Order of the learned Civil Judge, Senior Division at Panaji dated 20.4.2002 whereby the learned Civil Judge, Senior Division had set aside the Award with regard to Claim no.1 pertaining to compensation for prolongation of contract. In the said appeal the respondent Union of India has also filed a cross objection with regard to upholding of Claim no.6, 7 and 8 by the original claimant.

2. Mr. Usgaonkar the Counsel appearing on behalf of the appellant contended that as far as Claim no.1 is concerned, the same was clearly permissible and the learned Civil Judge, Senior Division had committed a patent error in not granting the same. As admitted there was a prolongation of the contract and as there was a loss with regard to the same, the claimant was entitled to be compensated with regard to the same. To put it in other words, the claim was with regard to extra expenditure incurred due to prolongation of the contract. With regard to the above, the learned Counsel appearing on behalf of the respondent Union of India submits that the same falls squarely under clause 11A and B of the contract "excepted matters" and as per the clause 11C with regard to any extension of time i.e. to say prolongation of the contract no claim or compensation can be granted as per the said clause 11C which clause 11C reads as under :-

"(C) No Claim in respect of compensation or

otherwise, howsoever arising as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

3. As far as the cross objections filed by Union of India, Mr. Badrinarayan contended that as far as Claim no.6 is concerned i.e. regarding payment of work executed in various agreement items, extra items, substituted items, deviated items, etc., he contended that as per clause No.10(B) of I.A.F.W. - 2249, dealing with materials to be supplied by Government, the same is clearly not arbitrable and decision of the Chief Works Engineer shall be final and binding .

4. Similarly as far as Claim no.7 is concerned, the learned counsel pointed out that the Department was entitled to encash the Bank Guarantee as per the conditions of contract namely condition 67 of I.A.F.W. - 2249 and the learned Arbitrator could not have awarded the same as it goes beyond the terms of the contract namely condition 67.

5. Similarly, as far as Claim no.8 by way of interest is concerned, Mr. Badrinarayan submits that as Claims no. 6 and 7 are not sustainable, the Claim no.8 would not arise. Mr. Badrinarayan strongly relied in Judgment of the Supreme Court in ***Thawardas Pherumal and another v. Union of India, AIR 1955 SC 468*** wherein the Hon'ble Supreme Court in

paragraph 8 has clearly held that if the contractor agrees to an express term of the contract, then the contractor is tied down to the same. Paragraph 8 reads as under :-

> "We are clear that the arbitrator went wrong in law. Government departments have their difficulties no less than contractors. There is trouble with labour, there is the likelihood of machinery breaking down in out of the way places and so forth; there was also the danger of thunder storms and heavy showers of rain in the month of May: it will be remembered that the last date of delivery was 25.5.46.
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> If, with that in view, Government expressly stipulated, and the contractor expressly agreed, that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affair."

6. Similarly Mr. Badrinarayan also referred to another Division Bench Judgment of the Delhi High Court in ***Delhi Development Authority v. Jagan Nath Ashok Kumar, 2000 (Suppl.)Arb. LR 281 (Delhi) (DB)***,

wherein also in paragraph 8, they have reiterated the concept “excepted matters” cannot be relied upon. Paragraph 8 reads as under :-

> “It is not in dispute that the counter Claim No.1 falls in 'excepted matter' i.e., as per the arbitration clause dispute regarding Claim No.1 was not referable. Such a matter therefore, normally, could not have been referred to Arbitrator and the position in this respect stands settled by catena of judgments of this Court following the dicta laid down by the apex Court [Refer: Vishwanath Sood vs. Union of India and Delhi Development Authority vs. M/s. Sudhir Brothers (supra)].”

Finally Mr. Badrinarayan relied on Judgment of the Supreme Court in ***Food Corporation of India v. Sreekanth Transport, (1999)4 SCC 491*** wherein paragraph 3 reads as under :-

> “3. “Excepted matter” obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator – concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts

> have been found out lacking in their jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the consistent view that in the event of the claims arising within the ambit of excepted matters, the question of assumption of jurisdiction of any arbitrator either with or without the intervention of the court would not arise. The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters; what these exceptions are however are questions of fact and usually mentioned in the contract documents and form part of the agreement and as such there is no ambiguity in the matter of adjudication of these specialised matters and being termed in the agreement as the excepted matters."

7. Having heard both the learned Counsel and after perusing the Award as well as the terms of the general conditions of contract, specially clause 7, clause 10B, clause 11 and clause 70, and Condition No.67 it is very clear that the decision of the Chief Engineer would be binding on the contractor and the same could not have been arbitrated upon. Once a party concedes to a finality, thereafter the party cannot go back on the

same. Therefore in view of the said clause 7 which deals with the "excepted matters" obviously the learned Arbitrator could not have arbitrated the same with regard to the claim of the partition in the water-tank. The learned Arbitrator had travelled beyond the terms of the contract and had exceeded its jurisdiction as rightly held by Civil Judge Senior Division.

8. As far as Claim no.1 is concerned, clause 11C makes it abundantly clear that once extensions are granted, there is no question of any compensation. It is obvious that once a party agrees to such a term of contract, then the party cannot resile from the same and resort to Indian Contract Act. As far as claim Nos.6 and 7, the parties have agreed to finality clause of Chief Works Engineer, then they become "excepted matters" and the learned Arbitrator has no jurisdiction to arbitrate upon. As far as Claim no.8 is concerned, namely Award of interest, if Claim no. 6 and 7 cannot be sustained, then there is no question of sustaining Claim no.8.

9. Under the aforesaid facts and circumstances, the Appeal under Arbitration Act No.7 of 2002 stands dismissed with regard to Claim No.1. As far as Cross-Objection in Appeal under Arbitration Act No.9 of 2002, is concerned, as Claims No. 6, 7 and 8 cannot be sustained in law, the said Cross-Objection in Appeal under Arbitration Act No. 9 of 2002 is

allowed in favour of Union of India, however, with no order as to costs.

DR. S. RADHAKRISHNAN, J.

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